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When You Think Infrastructure, Think FCC

by

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President Trump proclaimed last week "infrastructure week." Like much of his agenda, it remains to be seen what will become of Mr. Trump's infrastructure proposals.

But, meanwhile, over at the Federal Communications Commission, Ajit Pai, the energetic lawyer whom Mr. Trump appointed to chair the agency only three days after his inauguration, got a jump on the president. Mr. Pai designated the entire month of April "Infrastructure Month," using the time to advance his own ambitious infrastructure program.

Admittedly, "infrastructure" might not immediately come to mind when you think "FCC." But maybe it should. Mr. Pai often begins and ends his speeches talking about infrastructure investment. The analogy may be getting shop-worn, but in this day and age, who can doubt that reliable high-speed broadband networks are as crucial a component of the nation's infrastructure as last century's interstate highways.

Not surprisingly, a primary focus of Chairman Pai's infrastructure program has been support for more ubiquitous deployment of advanced broadband networks capable of delivering Internet services, at higher and higher speeds, especially in rural areas that remain unserved. In a

February 2017 address at the Mobile World Congress (MWC), Mr. Pai declared his commitment to pursuing "policies that promote infrastructure investment, foster innovation, and expand next-generation networks across the United States."

During the April "Infrastructure Month," the Commission announced new proposals specifically directed to spurring further deployment of advanced wireline and wireless networks. With regard to wireline networks, the agency proposed removing existing regulatory barriers that impede completion of the transition from legacy copper narrowband networks to modern digital broadband networks.

As significantly, the Commission proposed several measures intended to remove federal, state, and local regulatory obstacles to deployment of next generation "5G" networks, such as unreasonable zoning restrictions and denial of access to public rights-of-ways. Wireless providers have invested almost $500 billion in capital since 2000 to expand and upgrade their networks as demand for bandwidth continues to grow, especially with consumption of video on smartphones increasing exponentially.

New 5G infrastructure will require the placement of hundreds of thousands of new small cells, along with expanded transport facilities to provide needed coverage. The new 5G networks are expected to be up to 100 times as fast as current generation networks – and the wireless industry estimates that another $275 billion will be required to build out the new infrastructure. So, removing regulatory impediments that are unduly burdensome, too costly, or outright barriers to deployment is crucial.

Importantly, in his efforts to encourage deployment and upgrading of the nation's broadband infrastructure, Mr. Pai, thus far, is remaining true to long-held philosophical principles that disfavor, except in instances of demonstrated market failure, heavy-handed government intervention. Aware that the direct and indirect costs imposed by unnecessary regulation deter capital investment, Mr. Pai declared in his MWC speech that "we are in the process of returning to the light-touch regulation that produced tremendous investment and innovation throughout our entire Internet ecosystem."

Note that Mr. Pai said "returning." During the tenure of President Obama's FCC chairman, Tom Wheeler, excessive regulation was the rule. Nowhere was this investment-stifling regulatory excess more on display than in the adoption by the Commission in 2015 of so-called "net neutrality" regulations. Departing from the bipartisan consensus that largely had prevailed for almost two decades, the FCC reclassified Internet service providers (ISPs) as "telecommunications carriers" rather than "information service" providers. This reclassification means that the ISPs, in effect, are now subject to public utility-like regulation – just like last century's monopolistic Ma Bell or the nineteenth century's railroads.

To make matters worse, at the same time the FCC adopted what it called a "good conduct" rule to prohibit "unreasonable" discrimination or anticompetitive conduct by ISPs. The rule, by its own terms, establishes such an indeterminate standard that the Commission admitted it was a "catch-all" provision. Of course, catch-all regulations that confer so much bureaucratic discretion make it difficult for businesses to plan in a way that encourages innovation and investment.

And it appears that's what happened. Internet service providers have invested $1.5 trillion in private capital since 1996 to build out broadband networks. But since adoption of the FCC's 2015 order imposing public utility-like regulation, Free State Foundation research indicates, based on examination of historical capital expenditure data, that ISP investment is estimated to be $5.1 billion less than it would have been absent the order. On April 26, in announcing initiation of a new rulemaking, called *Restoring Internet Freedom*, proposing to reverse the agency's 2015 order, Chairman Pai cited this research.

Eliminating public utility-like regulation in the *Restoring Internet Freedom* rulemaking is an important part of the FCC's focus on spurring greater investment by our nation's Internet service providers. And the pending proposals to encourage more investment in high-speed wireline and wireless broadband networks by eliminating, or at least curtailing, unnecessary or costly regulatory impediments have the same objective.

Spurring private sector investment by Internet service providers in high-speed broadband networks should be viewed as a key part of the nation's infrastructure program. And the FCC should be viewed as a key infrastructure agency.

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